DEATH AS A CIVIL CAUSE OF ACTION IN MASSACHUSETTS.

THERE is no doubt of the right to life. There is no doubt that death is an injury. And yet where one person has been carelessly killed by another, the Supreme Court of Massachusetts has decided that there is no civil remedy. A husband sued for the loss of his wife;[1] a wife for the loss of her husband;[2] a parent for the loss of his child;[2] and an administrator for the death of his intestate.[3] All the actions failed, not on their merits, but apparently simply because they involved the death of a human being. The first case[1] is an unreported one, and therefore we have not the grounds of the decision. The next two cases[2] were decided simply on authority, which, meagre as it was, was considered sufficient to express the doctrine of the common law. In the last case[3] the opinion was written by Chief Justice Shaw. He offered a ground for the decision, saying that it was a rule of common law that "no actions for injuries to the person survive the death of the person receiving the injury." Undoubtedly this rule often prevented the need of any further explanation, as it did in the case of Higgins *v.* Butcher,[4] which is believed to be the first case on the subject. But it really offers no satisfactory explanation in itself. In the first place, it does not attempt to explain those cases where the plaintiff sues in his own right, — as, for instance, where a parent sues for loss of service of his child; for here the real party aggrieved is the parent, and he may well be alive at the time of the action.[5] In the second place, it fails where the suit is brought by one acting in a representative capacity, because, here, after the rule against the survival of actions was changed by statute,[6] the administrator was as badly off as he was before. For instance, a man was injured, and a cause of action accrued to him. He then died of his injuries, and

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[1] An unreported case at Nisi Prius of Supreme Court for Worcester, mentioned by C. J. Shaw in Kearney *v.* B. & W. R. R. Co., 9 Cush. 108, at p. 109.

[2] Carey *et ux. v.* Berkshire R. R. Co., 1 Cush. 475; Skinner *v.* Housatonic R. R. Co., 1 Cush. 475, — both cases decided in one opinion.

[3] Kearney *v.* B. & W. R. R. Co., 9 Cush. 108.

[4] Yelverton, 89.

[5] See Broom's Maxims, 5th ed., p. 904.

[6] Stat. of 1842, c. 89, sect. 1; now P. S., ch. 165, sec. 1.

the cause of action survived under the statute. The general rule of damages is that the plaintiff "has a right to recover all the damages which are the natural or necessary consequences of the cause of action set forth in the declaration."[1] There was no doubt that death was the natural consequence of the injury, and yet the court held that damages could be recovered only for the suffering, and not for the death.[2] We are therefore thrown back on authority; and the authority chiefly relied on by the Massachusetts court was Lord Ellenborough's decision in Baker *v.* Bolton.[3] The principal of that decision is stated in these words: "In a civil court the death of a human being cannot be complained of as an injury." That is to say, homicide is always a purely criminal affair.

The explanation of Lord Ellenborough's statement is to be sought in history. If we go back far enough in point of time, we shall find that death was originally a private wrong, and that the law underwent a change, the reverse of which is taking place to-day. Sir James Fitzjames Stephen, in his History of Criminal Law, points out that in all cases of homicide the wrong was regarded in the early English laws more as a civil offence than as a criminal one. Speaking of the laws of Æthelbirht, he says: "The damage to be paid to the family of the deceased, and the satisfaction to be made to the person whose peace has been broken by the homicide, are much more prominent and more important than what we should term the criminal consequences of the offence. These, however, are not altogether unnoticed."[4] Then came a period of transition, as Mr. Justice Stephen puts it, "from the view that homicide was a wrong to the survivors, to the view that it was an offence against the state."[5] In the time of the Year-books the change was complete, and every sort of homicide had become a criminal offence. The conception of moral responsibility, however, was much less developed than it is now. The idea of negligence, in its modern sense, can hardly be said to have existed. The consequence was that almost every accidental killing was criminal, whether the author of it was morally responsible or not.[6] These accidental deaths

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[1] *Per* C. J. Bigelow, in Prentiss *v.* Barnes, 6 Allen, 410.

[2] Bancroft *v.* B. & W. R. R. Co., 11 Allen, 34.

[3] 1 Campb. 493.

[4] History of Criminal Law, vol. iii. p. 23.

[5] Ibid., p. 26.

[6] See cases collected by Hale and by Hawkins: Hale, P. C., vol. i. ch. 39, pp. 471–477; Hawkins, P. C., vol. i. ch. 29, pp. 176–180.

were not manslaughter, or even felonies. They were, if I may use the term, a sort of public tort, or damage done to the community. And the defendant was punished with the loss of his goods, because, as Lord Hale says, "The king hath lost a subject, and that men should be more careful." In fact, Lord Hale, who classifies these cases under the head of involuntary homicides, or homicides *per infortunium*, admits that the question of moral guilt has little to do with it, by calling it, "not the crime, but the misfortune" of the defendant.[1]

On the other hand, there is not a trace of any action of tort. And there are two good reasons for this. In the first place, the punishment both in felonious homicides and in homicides *per infortunium* involved the forfeiture of the prisoner's goods. This was the situation which probably gave rise to the saying that a tort is merged in a felony,[2] and it would equally prevent any civil action in homicide *per infortunium*.[3] So long as the prisoner's goods belonged to the Crown, it would be useless, if not dangerously impertinent, for a private individual to try by independent action to get them.

In the second place, there was no great need of an action of tort. The great majority of homicides at that time were felonious, and there already existed in such cases a *quasi* civil remedy for the benefit of the heir or widow of the deceased. This was the vindictive action called appeal.[4] It was allowed by statute to co-exist with the criminal action.[5] The defendant, if found guilty, did not pay any damages to the plaintiff, but was punished as he would have been in a criminal case. The real advantage to the plaintiff lay in the fact that he could release his rights, just as the king could grant a pardon. And such releases seem frequently to

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[1] "Though the killing of another *per infortunium* be not in truth felony, nor subjects the party to a capital punishment, and, therefore, usually in such cases, the verdict concludes *quod interfecit per infortunium et non per feloniam*, yet the party forfeits his goods, and though he ought to have *quasi de jure* a pardon of course upon the certificate of conviction, yet he is not to be discharged out of prison, but bailed till the next term or sessions to sue out his pardon of course; for though it is not his crime, but his misfortune, yet, because the king hath lost his subject, and that men should be more careful, he forfeits his goods, and is not presently absolutely discharged out of prison, but bailed *ut supra*." — Hale, P. C., vol. i. p. 476.

[2] Opinion of Bigelow, J., in B. & W. R. R. Co. *v.* Dana, 1 Gray, 83, at p. 97. Opinion of Parker, J., in Boardman *v.* Gore, 15 Mass. 331, at p. 338.

[3] See Shields *v.* Young, 15 Ga. 349.

[4] 1 Comyn's Digest, 627. See also Goose's Case and Perries' Case, Moore, 164; Seddons *v.* Johnson, 2 Shower, 375; Smith *v.* Bowen, 2 Ld. Raymond, 1288.

[5] Stat. of Gloucester, 6 Edward 1, ch. 9, and 3 Henry 7, ch. 1. sect. 3.

have had great pecuniary value. This method of proceeding was revived as late as 1818, in the case of Ashford *v.* Thornton.[1] Its barbaric elements were then so prominent that a special statute was passed the next year to abolish it,[2] and for the next twenty-seven years, — that is, till the passage of Lord Campbell's Act in 1846,[3] — England was without any sort of a civil remedy in death cases.

Now let us return to the criminal side of the question. Lord Hale left the bench in 1676, and during the next hundred years another change took place. Homicide *per infortunium* disappeared, and the criminal law confined itself more and more to what Lord Hale called crime, or cases of moral guilt. The change was effected by the judges. Foster, who was apparently the first to notice it, says: "I therefore think that those judges who have taken general verdicts of acquittal in plain cases of death *per infortunium* have not been to blame. They have, to say the worst, deviated from ancient practice in favor of innocence."[4] Blackstone also notices this change, and his editor, Edward Christian, Esq., in 1795 appended the following note: "When homicide does not amount to murder or manslaughter, it is now the universal practice to direct an acquittal."[5] That was the end of homicide *per infortunium*.

The idea that death was always a criminal matter, however, had more vitality. It had the force of a moral idea. It expressed the sacredness of human life. And it continued to make itself felt. In the English criminal law manslaughter extended to cases of negligence,[6] whereas other crimes to the person, such as mayhem, battery, and assault, were confined to intentional injuries. In purely civil cases, relief was denied as late as 1808 on the ground, as Lord Ellenborough said, that death was always a criminal matter, not a civil one.[7] And this same idea again appears, where perhaps it might be least expected, in statute law. In 1787 the Legislature of Massachusetts passed its first statute creating liabil-

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[1] 1 Barn. & Ald. 405.

[2] 59 Geo. 3, ch. 46.

[3] 9 & 10 Vict. 93.

[4] Foster's Crown Law, p. 288 (1762).

[5] Blackstone, Edward Christian's edition, vol. iv. p. 188 and note.

[6] Hull's Case, Kelyng, 40; Reg. *v.* Swindell, 2 C. & K. 230; Reg. *v.* Franklin, 15 Cox C. C. 163.

[7] Baker *v.* Bolton, 1 Campb. 493. — N. B. The doctrine that a tort was merged in a felony was prevalent about this time; see Gibson *v.* Minet, in the House of Lords, 1794, reported in 1 Henry Blackstone, 569.

ity in death cases.[1] It was an Act making towns liable for accidents caused by defective highways. The Legislature was practically unhampered by precedent.[2] It could build up the law as it pleased according to principle, and it did so. The seventh section of the Act deals both with cases of personal injury and with cases of death. In cases of personal injury the town was made liable to a civil action. In cases of death the town was liable criminally to be "amerced in one hundred pounds, upon conviction on a presentment or indictment of the grand jury." This deliberate theoretical distinction between personal injuries and death was universally followed by our Legislature down to 1881, when actions of tort were first provided in death cases.[3] Even these last actions had a criminal element in them. The amount to be recovered was confined between two limits, like a fine; and between those limits it was to be assessed "with reference to the degree of culpability." And every Massachusetts statute now in force retains these same criminal elements.[4]

There is a modern reason for this, so far as any action by the personal representative for the wrong done to the deceased is concerned. There is no rule known to the common law for estimating damages in such a case. Formerly, when homicide was largely a civil affair, every man had his *wergild*, which was practically the price of his life, and varied according to his rank.[5] But this conception disappeared long ago, and the only modern rule for civil damages is compensation. And as Mr. Justice Knowlton has said, "There is no mode of estimating compensation for the death of a man."[6] It is therefore still necessary, before the personal representative can recover for the wrong done to his deceased, for the Legislature to have fixed some arbitrary standard or limit to the amount to be recovered, which is really more in the nature of a fine than of compensation in the ordinary sense.

It remains to consider the rights of the relatives of the deceased.

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[1] Passed March 5, 1787; known as statute of 1786, ch. 81.

[2] No common law liability for defective highways, Mower *v.* Inhabitants of Leicester, 9 Mass. 247. There was an old colonial statute on this point, v. Will. & Mary, ch. 8, but it did not make any material distinction between actions for suffering and actions for death. See also Colonial Laws, p. 13, Act 1648, c. 51.

[3] Stat. of 1881, ch. 199.

[4] Public Statutes, ch. 52, sect. 17; ch. 73, sect. 6; ch. 112, sect. 212; Act of 1883 ch. 243; Act of 1887, ch. 270; Act of 1892, ch. 260.

[5] Stephen, Hist. Criminal Law, vol. i. p. 57.

[6] Ramsdell *v.* N. Y. & N. E. R. R. Co., 151 Mass. 245, at p. 249.

A husband is bound to support his wife, and he has a right to her society. Consequently if she receives injuries which either increase his burdens or decrease his rights, he has a cause of action.[1] And a parent has a similar action for injuries to his child.[2] In case of death, however, both these actions vanish.[3] It is submitted that there is no modern reason, theoretical or practical, why they should. They contain all the elements of a common law case. There is a common law right on the part of the plaintiff, an infringement of that right by the defendant, a practical measure of damages,[4] and no outside considerations. And yet it is easy to see how the court arrived at an opposite conclusion. It first looked for some decision in a death case, or statement, allowing the action, and it found none. It then looked for decisions against such an action, and it found Baker *v.* Bolton,[5] to the effect that the death of a human being was not the ground for a civil action for damages. It then felt that its researches were complete, and it summed them up by referring to Baker *v.* Bolton, and saying, "Such, then, we cannot doubt is the doctrine of the common law, and it is decisive against the maintenance of these actions." And the majority of the Court of Exchequer in Osborne *v.* Gillett[6] followed the same course of reasoning. All such reasoning has a tacit premise. It all assumes that somewhere *in nubibus* or *in gremio magistratuum* there exists a complete, coherent, symmetrical body of English law, of an amplitude sufficient to furnish principles which would apply to any conceivable combination of circumstances.[7] Starting with such a premise, with the evidence it had before it, the court could hardly have avoided its conclusions. And yet with such a premise a failure of justice was almost inevitable. As long as homicide *per infortunium* and the barbarous remedy of appeal existed, any precedent for a purely civil action was impossible. It is only by considering the law as a growth, as a product of evolution, that the disappearance of these barbaric elements can be made to clear the way for a fuller application of the principles of justice.

Last, and at common law least, come the rights of the widow and children. A man, as long as he is alive, is bound to furnish

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1 Dennis *v.* Clark, 2 Cush. 347.
2 Wilton *v.* Middlesex R. R. Co., 125 Mass. 130.
3 Carey *v.* Berkshire R. R., 1 Cush. 475.
4 Ford *v.* Monroe, 20 Wendell, 210.
5 1 Campb. 493.
6 L. R. 8 E. 88.
7 See Sir Henry Maine, Ancient Law, p. 31.

his wife and child with the necessities of life. As long as he is alive, they are in theory provided for; they have a right to support. When this right is infringed by the wrongful act of a third party, all the elements of a common law action again exist. And yet there is no trace of such an action.[1] Practically the widow and children do not often suffer. If the head of the family is injured without being killed, he can, of course, bring an action, in the result of which his family will share. If he is killed, formerly the family were protected by the remedy of appeal, and they are now protected by statute. Most of the Massachusetts statutes provide that the damages recovered in death cases shall be divided between the widow and children.[2] The last statute, the so-called Employers' Liability Act, distinctly recognizes the claim to support as the basis of the action, by giving the damages to the widow or dependent next of kin.[3]

There is one other observation to make about these statutes. They are emphatically the product of the times. Formerly, when men were less civilized, machinery almost unknown, and malice with its attendant violence more frequent, the great majority of homicides were felonious. And as a natural consequence the remedy of appeal met the evil of the day by providing for cases of felony. In cases of homicides *per infortunium* the widow and children were left without remedy.[4] Now, morals being better, and machinery in use almost everywhere, the great cause of homicides is not malice, but carelessness; and consequently the statutes of Massachusetts content themselves with providing for death by negligence. It is now the felonies which are the *casus omissus*. The widow of a murdered man to-day is consequently less protected than she would have been five hundred years ago.[5]

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[1] Carey *et ux. v.* Berkshire R. R. Co., was in fact such an action. But, as Baron Bramwell pointed out in Osborne *v.* Gillett, neither the court nor the counsel seem to have paid any attention to that fact, and the case was disposed of on other grounds.

[2] Public Statutes, ch. 52, sect. 17; ch. 73, sect. 6; ch. 112, sect. 212. See also opinion in Higgins *v.* Central N. E. R. R., 155 Mass. 176, at p. 181.

[3] Act of 1887, ch. 270, sect. 2, and as amended by Act of 1892, ch. 260.

[4] Stat. of Gloucester, 6 Edward I, ch. 9.

[5] For a statute that covers this subject carefully, see Acts of the State of Maine for 1891, chap. 124.